

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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JUN 29 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 19 of the)
Cable Television Consumer Protection)
and Competition Act of 1992)
)
Annual Assessment of the)
Status of Competition in the)
Market for the Delivery of)
Video Programming)

CS Docket No. 94-48

COMMENTS OF DIRECTV, INC.

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COMMENTS OF DIRECTV, INC.

DIRECTV, Inc. ("DIRECTV") hereby submits the following comments to the Commission's Notice of Inquiry ("NOI") in the above-captioned matter.

I. INTRODUCTION AND SUMMARY

The launch of DIRECTV's DBS-1 satellite on December 17, 1993 -- the culmination of over ten years and some \$600 million worth of effort and investment -- inaugurated a new era in the provision of video programming.^{1/} Beginning just a few weeks ago, DIRECTV, along with another competitor, United States Satellite Broadcasting Co., Inc. ("USSB"), introduced into the marketplace the nation's first high-powered Direct Broadcast Satellite ("DBS") services to consumers. DIRECTV's programming originates at its state-of-the-art \$120 million uplink center near Castle Rock, Colorado. The programming is digitized, encrypted and beamed to DBS-1, a 6,000 pound high-powered satellite now in geostationary orbit above the Earth. DBS-1 currently transmits over 50 channels of subscription and pay-per-view programming to DIRECTV customers, who receive the service

^{1/} DIRECTV is a wholly-owned subsidiary of Hughes Aircraft Company and an affiliate of Hughes Communications Galaxy, Inc. ("HCG"). HCG is a Commission licensee in DBS service, and DIRECTV is the DBS operating, customer service and programming acquisition arm of the Hughes family.

via dishes only eighteen inches in diameter. As its controlled service rollout continues and its second satellite, DBS-2, is launched later this year, DIRECTV will by the fall of 1994 have expanded its service to provide about 150 channels of digital programming directly to households throughout the continental United States on a nationwide basis. In short, the vehicle to provide essential competition to cable television providers envisioned by the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") has been launched.^{2/}

In this proceeding, pursuant to its statutory directive to present an annual report to Congress on the status of competition in the market for the delivery of video programming, the Commission seeks to gather information regarding the current state of the multichannel video programming marketplace, including the effect that the 1992 Cable Act and the Commission's rules have had on the entry and development of competitors in that marketplace.^{3/} In offering the following responses to the Commission's inquiry, DIRECTV wishes to emphasize how critical the 1992 Cable Act and the Commission's implementing regulations on program access have been to high-power DBS's development in general and DIRECTV's development in particular as the most promising emerging MVPD competitor to cable television operators. Enabling new MVPDs like DIRECTV to gain access to the critical vertically integrated program offerings they need to become real competitors is the

^{2/} In the parlance of the 1992 Cable Act, DIRECTV has now entered the video market as a multichannel video programming distributor ("MVPD") using an alternative to cable technology and other video programming delivery systems. MVPDs are entities "engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming." In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order, MM Docket No. 92-265 (released April 30, 1993)("Program Access Order"), at 3, ¶ 6 n.3.

^{3/} See NOI at ¶ 7.

Commission's first, best path to transition itself out of the business of regulating cable rates and to allow effective competition to guide the functioning of the multichannel video marketplace.

Nevertheless, effective competition obviously is not yet here. Cable operators and vertically integrated programmers continue to possess and exercise enormous market power. Thus, as it evaluates the status of competition in the video marketplace, DIRECTV's urgent message to the Commission in this proceeding is to remain vigilant in its enforcement of the 1992 Cable Act's program access protections. The Commission must not allow the program access rules to be diluted, "interpreted away" or otherwise undercut by vertically integrated cable interests unhappy at the prospect of facing emerging competition. As set forth in more detail below, some vertically integrated cable interests have continued to fight on numerous fronts -- in the marketplace, in the federal courts and at the FCC -- to stifle competition.

II. OVERVIEW

From the time that DIRECTV's affiliate HCG first received its DBS authorization from the Commission, DIRECTV has pursued programming agreements through informal discussions and formal negotiations with cable programmers, movie studios, broadcasters, sports rights holders, and other sources of programming. Indeed, the single-most important issues confronting DIRECTV over the past three years have surrounded its efforts to obtain programming carriage agreements.^{4/}

^{4/} Programming obviously is the lifeblood of the multichannel subscription television industry. See, e.g., 138 Cong. Rec. H6533 (daily ed. July 23, 1992) (remarks of Rep. Tauzin) ("It will do us little good to hope in vain for the advent of a DBS, direct broadcast satellite, industry or for the expansion of wireless cable in America as competition to [the cable] monopoly if none of it can get programming. Programming is the key."). Most "marquee" programming

DIRECTV's general experience in the program acquisition area has featured a number of success stories. For example, DIRECTV successfully negotiated agreements with virtually every major Hollywood studio -- Columbia, Disney, Miramax, Paramount, Sony, Touchstone, TriStar, Turner MGM, Universal and Warner Brothers -- to bring its customers a wide assortment of current, digitally broadcast pay-per-view movies on a scale that is unmatched in the video distribution marketplace. Similarly, DIRECTV has obtained programming from leading-edge independent cable programmers, including ESPN, USA Network, A&E, the Nashville Network, and the Disney Channel.

It was in the all-important category of vertically integrated programming, however, where DIRECTV needed and received critical aid from Congress and the Commission. When the Commission first sought comment on its then-proposed program access rules, DIRECTV bleakly observed that, with the launch of DBS-1 less than a year away: "Thus far, DIRECTV has not been able to announce any program carriage agreements with any vertically integrated cable programming vendors."^{5/} Today, only a year and a half later, as a consequence of the passage of the 1992 Cable Act and the subsequent implementation of the Commission's program access rules, DIRECTV has been able to make significant inroads in obtaining many important vertically integrated basic-tier program offerings. For example, DIRECTV has been able to obtain essential basic cable program

is supplied by vertically integrated cable companies. Thus, the legislative history of the 1992 Cable Act noted that, according to the National Cable Television Association ("NCTA"), 39 of the 68 nationally delivered cable networks have some ownership affiliation with cable operators. House Report at 41. In particular, Time Warner and Viacom, for example, supply such "showcase" services as Home Box Office, Cinemax, Showtime, The Movie Channel, MTV, Nickelodeon, Comedy Central, MTV, VH-1, among others.

^{5/} See Comments of DIRECTV, Inc., MM Docket No. 92-265 (Jan. 25, 1993), at 2.

offerings such as CNN/Headline News, Encore, Court TV, the Family Channel, the Discovery Channel, and the Weather Channel. DIRECTV also has been able to deal successfully with cable companies like Liberty Media Corporation, which has made clear its intent to sell DIRECTV its programming on reasonable terms and conditions in the manner envisioned by the 1992 Cable Act.

Problems, however, remain. DIRECTV, for example, continues to be completely barred from obtaining some of the most essential vertically integrated premium program offerings, e.g., Home Box Office, Showtime, The Movie Channel, Cinemax or Flix. And unfortunately, there are also indications of a continuing broader, multi-front campaign by cable, even in the wake of the FCC's implementation of the 1992 Cable Act, to use its market power to influence the development of emerging competition. DIRECTV asks the Commission to take note of the following events of the past year:

1. Primestar

Primestar Partners ("Primestar") is a Direct-to-Home ("DTH") joint venture of the subsidiaries of six national cable television companies and G.E. American Communications (which owns the satellite currently used by Primestar). According to antitrust complaints brought by both the plaintiff States and the Department of Justice in the Southern District of New York in the Primestar Partners case, Primestar's very existence was predicated on the "threat of cable-competitive entry into medium or high-power DBS,"^{6/}

^{6/} United States v. Primestar Partners, L.P., et al., No. 93-Civ-3913, Competitive Impact Statement, 58 Fed. Reg. 33,948, 33,949 (June 23, 1993) ("Competitive Impact Statement"); see State of New York v. Primestar Partners, L.P. et al., Complaint, 93 Civ. No. 3868 (S.D.N.Y. June 9, 1993) ("State AG Complaint"), at ¶¶ 51-62.

and the entity was formed in order to "suppress and eliminate DBS competition in the delivery of multichannel subscription television programming to consumers."^{7/}

Although the actual antitrust complaints were subsequently settled in a series of consent judgments ("the Primestar Decrees") approved by the court over DIRECTV's and others' strong objection, an especially troubling fact is that the cable friendly regime approved by the Primestar Decrees is far different than the framework created by Congress in the 1992 Cable Act, a fact which the Commission itself recognized in its own amicus memorandum in the Primestar case.^{8/} The Primestar Decrees were structured according to an antitrust-based standard far less protective of either emerging MVPD competition or competitors than that mandated by the 1992 Cable Act. And a major reason for DIRECTV's participation in that proceeding was its fear that the Primestar Decrees would position the cable industry and others to argue and reshape the 1992 Cable Act's competition requirements by arguing in proceedings such as this that such requirements can and should be construed in accordance with the narrower provisions of the Primestar Decrees. Although the Commission, DIRECTV and the other amici succeeded in obtaining clarification from the

^{7/} Complaint at ¶ 52. The plaintiff States further alleged that the defendant MSOs "designed and structured their DBS venture in order to reduce the potential for direct competition" with their cable systems, in order to "undermine the ability of any cable competitive DBS service to develop." Id. at ¶ 58.

^{8/} State of New York v. Primestar Partners, L.P., FCC Amicus Memorandum at 2 (Commission is "concerned that the Decrees . . . are fundamentally at odds with, and will affirmatively undermine the public interest objectives of the 1992 Cable Act and the Commission's implementing regulations"). This sentiment was echoed by several members of Congress, including Representative Billy Tauzin, the sponsor of the program access provisions of the 1992 Cable Act: "The States' proposed consent decrees seem to create a regime which permits competition to be managed by the cable industry. Every segment of the multichannel video programming distribution industry in competition with cable defendants is disadvantaged by the States' proposed consent decrees." Letter to James H. Quello, Acting Chairman of the Federal Communications Commission (August 6, 1993).

Court and the Justice Department that the Primestar Decrees constitute a negotiated settlement and should not in any way be taken as a statement of interpretation or public interest pronouncement on the propriety of exclusive contracting practices or other competitive determinations under the 1992 Cable Act, cable interests and their benefactors have already come before the agency and attempted to use the Primestar Decrees affirmatively in exactly the manner that DIRECTV and the Commission itself predicted.^{9/}

2. The "Headend in the Sky"

TCI, the country's dominant cable operator, recently unveiled its \$100 million National Digital Television Center along with its so-called "Headend in the Sky" program. Although it is possible that different types of wireless players will be permitted access to this uplink facility, TCI in April stated publicly that it "reserves the right to provide services to parties of our choice."^{10/} These "parties of choice" became clear last week as TCI

^{9/} Specifically, issues concerning the legality of exclusive contracts between vertically integrated programmers and non-cable MVPDs are currently pending before the FCC in its reconsideration of the program access protections. The Commission anticipated that if the federal court approved the Primestar Decrees, it would only encourage "proponents of an exclusivity provision to think that they need not justify exclusivity before the FCC under the demanding statutory standards . . . Instead, their argument will be that if an antitrust court, after considering the issue, found no need to prohibit exclusivity in their situations, neither should the Commission." FCC Amicus Memorandum at 14 (citation and footnote omitted); see also Joint Amicus Curiae Memorandum at 21 (noting danger, if decrees are approved, that cable interests "would argue in other forums that the Decrees reflect the views of the State Attorneys General and the Court on the appropriate MVPD market structure and competition principles"). HBO, Viacom, and USSB have all attempted to promote such exclusivity, and USSB in particular has argued explicitly and repeatedly before the agency and elsewhere that the exclusivity issue was resolved in the Primestar case. See, e.g., Opposition of United States Satellite Broadcasting Co. to Petition for Reconsideration, MM Docket No. 92-265, at 6 n.6; "The USSB View of Program Exclusivity in the DBS Marketplace," MM Docket No. 92-265 (Sept. 28, 1993) at 4-5; USSB Ex Parte Response to Ex Parte Presentation by the National Rural Telecommunications Cooperative (Jan. 24, 1994), at 4.

^{10/} Peter Lambert, "Wireless Players Study TCI's Headend in the Sky," Multichannel News (April 18, 1994), at 38.

signed an \$80 million dollar pact with Primestar to use the Center to transmit Primestar programming.^{11/} Thus, in addition to terrestrial cable systems and cable programming, the cable industry is now extending its control the satellite facilities used to distribute such programming.

3. The Court TV Case

Almost immediately after the program access rules were passed, Time Warner Cable sought to invoke Commission procedures to declare its exclusive arrangement with Court TV to be in the public interest -- an arrangement which effectively precluded Liberty Cable, an emerging SMATV operator, from obtaining this programming. The Commission rejected Time Warner's petition, finding that the proposed exclusive agreement "withholds a popular service from emerging competitors to cable . . . thereby directly constraining the development of competition in a particular local distribution market," and that the proposed exclusivity "will similarly inhibit competition in other local distribution markets and in the national distribution markets."^{12/}

4. The DBS Exclusivity Issue

HBO, Viacom and USSB have all sought to re-cast a relatively narrow petition for reconsideration of the program access rules filed by the National Rural Telecommunications Cooperative ("NRTC") into a broad referendum and policy pronouncement on an issue that has not been resolved by the Commission, namely, whether exclusive distribution agreements between vertically integrated programmers and non-cable

^{11/} See "Primestar latest to use NDTC," Broadcasting & Cable (June 27, 1994), at 72.

^{12/} In the Matter of Time Warner Cable, Petition for Public Interest Determination under 47 C.F.R. § 76.1002(c)(40) Relating to Exclusive Distribution of Courtroom Television, CSR-4231-P (released June 1, 1994), at ¶ 55.

MVPDs are permissible under the 1992 Cable Act. While DIRECTV's position has been set forth more completely in its filings in MM Docket No. 92-265,^{13/} it is important to reiterate here two fundamental consequences that will follow from any broad pronouncements favoring exclusivity in that proceeding.

First, if exclusive distribution contracts between vertically integrated programmers and non-cable MVPDs are deemed to be per se acceptable, then vertically integrated programmers can strategically "carve up" DBS programming packages in a manner that virtually ensures that consumers will pay more for a full complement of programming when purchasing service from competing DBS providers -- by being forced to piece together program offerings from services offered by multiple DBS operators -- than when purchasing from a single cable operator, wireless cable operator or other alternative MVPD offering the same programming in an integrated package. Second, crucial aspects of the program access rules with respect to exclusionary practices remain to be developed through the Commission's complaint and enforcement process,^{14/} and a broad pronouncement that exclusive contracts between vertically integrated programmers and non-

^{13/} See Ex Parte Response of DIRECTV, Inc., MM Docket No. 92-265 (May 26, 1994); Reply of DIRECTV, Inc., MM Docket No. 92-265 (July 28, 1993), at 2-4.

^{14/} Such complaints will also involve provisions of the 1992 Cable Act other than the specific limitations on exclusive contracting set forth in Sections 628(c)(2)(C) and (D). Exclusive arrangements between vertically integrated programmers and non-cable multichannel video programming distributors in many circumstances, for example, violate Section 628(b)'s general prohibition of "unfair practices" which hinder significantly or prevent any MVPD from obtaining access to cable programming. In addition, they violate Section 628(c)(2)(B)'s prohibition against discrimination by a vertically integrated satellite cable programming vendor in the prices, terms and conditions of sale or delivery of satellite cable programming "among or between cable systems, cable operators, or other multichannel video programming distributors." Section 628 (c)(2)(B) (emphasis added).

cable MVPDs are per se acceptable would make it virtually impossible for any specific program access complaint to proceed under these provisions.^{15/}

As noted in its filings in the reconsideration docket, DIRECTV believes that the Commission should find such exclusives presumptively unlawful and subject to substantial burdens of justification. The point here, however, is that the controversy is yet another cable industry paeans of praise to monopoly. While exclusive arrangements with vertically integrated programmers may be acceptable to the single MVPD who happens to be favored by the cable interests, such arrangements violate the public interest, the Cable Act, and the Commission's rules.

DIRECTV requests that the Commission consider the above incidents in evaluating the state of emerging competition in the MVPD marketplace.

III. RESPONSE TO SPECIFIC ISSUES

Set forth below are DIRECTV's responses to certain of the specific questions raised in the Commission's NOI.

^{15/} These dangers were acknowledged quite recently in a letter from six congressional representatives, including Representative Tauzin:

It has become evident that the cable industry has been attempting to manipulate the Commission's reconsideration proceeding to obtain an overly broad Commission declaration as to the general propriety of exclusive contracts with non-cable multichannel video programming distributors. Any such pronouncement would eviscerate the program access protections of the 1992 Cable Act.

Letter to the Hon. Reed Hundt (June 15, 1994), at 3.

A. Analytical Approaches

While DIRECTV believes that all of the methodologies cited by the Commission^{16/} could have utility in assessing the presence and status of competition in the MVPD marketplace, DIRECTV wishes to stress the limitations of any of the standard antitrust approaches mentioned by the Commission. It is clear that the 1992 Cable Act changes standard antitrust analysis.

Over and over again, cable interests have attempted to re-open and win in other forums a congressional debate they clearly lost at the time of the 1992 Cable Act's passage. Specifically, cable interests supported adoption of an amendment proposed by Representative Manton, which essentially would have imposed a much more lenient antitrust "harm to competition" standard on cable providers and, accordingly, would have imposed much heavier burdens of proof on competing MVPDs seeking to invoke the 1992 Cable Act's program access protections. This amendment was rejected in favor of one proposed by Representative Tauzin, which, for example, removed the Manton requirement that MVPDs prove "unreasonable restraint of competition" in bringing a program access complaint.^{17/}

This is significant because the plain meaning of the 1992 Cable Act and its legislative history are clear that Congress did not pass the Act merely to preserve existing antitrust laws and a competitive marketplace. Instead, the statute acknowledges that there was then and continues to be no competitive marketplace for multichannel video

^{16/} NOI at ¶ 10. Such methodologies include standard structure-conduct-performance analyses and complementary antitrust concepts; contestable market theory; transaction cost economics; and econometric studies of demand. Id.

^{17/} For a more in depth discussion of this point, see Reply Comments of DIRECTV, Inc., MM Docket No. 92-265 (Feb. 16, 1993), at 1-6 & Appendix.

programming distribution, and takes specific, targeted steps to enable that marketplace to develop for the first time. Accordingly, the efforts of cable interests to use antitrust analyses alone -- or purported antitrust pronouncements like the Primestar Decrees -- as to what types of arrangements are acceptable under the Act are utterly misplaced. The 1992 Cable Act provides a means to ensure that competitors to existing cable systems -- each and every one - obtains access to programming from vertically integrated suppliers on non-discriminatory terms and conditions. Thus, whatever analysis the Commission ultimately adopts to measure competition in the multichannel video marketplace, it should never lose sight of the 1992 Cable Act's all-important regulatory overlay on traditional antitrust principles.^{18/}

B. Fostering Competitive Technologies

1. Market Definition

In seeking to obtain the proper focus in tracking the development of effective competition, the Commission asks whether it should examine competition on a local basis, specifically as it relates to cable, or on a broader geographic basis, measuring the extent of MVPD distribution and penetration. DIRECTV believes that the Commission must look at both local and national markets in determining the state of MVPD competition. Ultimately, however, it should measure the presence of effective competition on a local-market by local-market basis. In this regard, even DBS has certain local aspects, although it fundamentally serves a national market. Notwithstanding the national scope of the service, for example, issues such as the effect of restrictive local zoning ordinances, access restrictions to multiple

^{18/} For this reason, the Commission should clarify in this proceeding that its inquiries on this point and elsewhere in the NOI with respect to the potential analytical uses of antitrust analysis are in no way intended to re-open settled (and contentious) questions resolved in the passage of the 1992 Cable Act.

dwelling units, or other restrictions on dishes may require a more "fine grained" competition analysis than broadly defined geographic markets would allow.^{19/}

2. Direct-to-Home Satellite Services

The NOI poses numerous questions relating to the status of competition to cable from both medium- and high-powered DBS services. With respect to competition to cable provided by medium-power "DBS," the answer is relatively clear -- there effectively is none. Currently, the only medium-power DTH provider is Primestar, which literally is owned by cable operators and is now part of TCI's "headend in the sky."

Primestar essentially is a national service sold only through local cable operators. Cable operators provide Primestar's customer service, billing, sales, installation, and maintenance. In most cases, the Primestar service is incremental to these operators' cable television business, *i.e.*, it is merely an add-on to local cable systems. Primestar thus is merely another way for cable operators to compete with and attract market share from a new alternative MVPDs like DIRECTV. It is thus highly unlikely that Primestar will ever develop into a real alternative to cable television.

Of all of the emerging MVPD alternatives technologies, high-power DBS has long been recognized as perhaps the most formidable nationwide potential medium capable of

^{19/} Some of these issues are before the Commission in other proceedings.

competing with cable television.^{20/} Moreover, high-power DBS is now a real, but newborn, competitor.

3. Specific Questions and Answers Regarding DBS

Below are responses to the Commission's specific inquiries regarding high-powered DBS service.

- (a) *What is the total estimated subscriber base for DIRECTV? What is the basis for this estimate?*

DIRECTV's potential subscriber universe will be at least 94 million television households. Since DIRECTV's reach is essentially ubiquitous, all United States households are potential DIRECTV subscribers.^{21/}

- (b) *What is the total estimated channel capacity of DIRECTV? What are the plans of DIRECTV to increase the digital compression ratio from the initial ratio used at the time of launch (so as to offer more channels at a later date)?*

DIRECTV's first satellite, DBS-1, is now in orbit with DIRECTV utilizing 11 of the satellite's 16 transponders.^{22/} DBS-2 is scheduled for launch later this year, and DIRECTV's system will use all 16 transponders on that satellite. Together, the satellites will provide an average of at least 5 channels per transponder of entertainment, educational and informational programming.

^{20/} See House Report at 46 (citing RAND Study below and agreeing that "during the 1990's, high-powered DBS systems have greater potential for widespread competition with cable systems than do other multichannel video alternatives"); Leland Johnson and Deborah R. Castleman, Direct Broadcast Satellites: A Competitive Alternative to Cable Television, R-4047-MF/RL (Rand 1991), at 78 (concluding that widespread competition to cable is most likely to come from high-power DBS) (included as Appendix 2).

^{21/} As noted above, local zoning ordinances or similar household access restrictions related to the residential purchase and placement of small dishes are relevant to this answer.

^{22/} The NOI states that USSB has "leased" 5 transponders on DBS-1. NOI at ¶ 30. USSB in fact owns these 5 transponders, which comprised a "payload" on DBS-1.

With regard to capacity and compression, there in fact are at least two ways that DIRECTV can and will increase channel capacity from the available bandwidth. First, DIRECTV can increase the power of the satellite transponders from 120 watts to 240 watts. On June 24, 1994, DIRECTV filed an application to launch and operate DBS-3, a third satellite. This satellite will allow DIRECTV to operate DBS-2 and DBS-3 in the 8 transponder 240 watt mode. As the application points out, operation in this mode will increase the signal-carrying capacity by approximately one-third from the 120 watt mode. Second, DIRECTV intends to improve the compression ratio itself, which DIRECTV believes will be greatly facilitated by the introduction of the new MPEG-2 digital compression standard next year, which also ensures compatability with new television formats such as wide-screen (16 X 9) and high-definition television (HDTV). DIRECTV anticipates that these developments will enable DIRECTV to provide another 15 to 20 video channels by the end of the first quarter of 1995.^{23/}

- (c) *How does DIRECTV market its services? Are current marketing efforts targeted equally to potential subscribers in areas served by cable systems as well as to areas unserved by cable systems? If not, why not?*

DIRECTV presently has three channels of distribution: (1) national, regional and independent consumer electronic retail stores; (2) satellite TVRO dealers; and (3) the National Rural Telecommunications Cooperative ("NRTC"). All three distribution channels serve both cabled areas and non-cabled areas, but the latter two (TVRO dealers and NRTC) especially target areas unserved or underserved by cable operators. In conjunction with DIRECTV's national rollout in the fall of 1994, DIRECTV will implement a \$40 million

^{23/} DIRECTV also notes, however, that the number of channels could decrease if an HDTV standard is adopted and DIRECTV eventually offers HDTV service offerings.

nationwide advertising campaign to build public awareness and promote the benefits of the DIRECTV service. DIRECTV's marketing and distribution approach position DIRECTV to offer the benefits of: 1) Increased viewer choice of programming; 2) Increased control of programming by subscribers; 3) Increased video and audio quality; and 4) Affordable/competitive price.

- (d) *What is the projected subscriber level for each operator within one year of launch of service? Within three years? What is the basis for these projections?*

It is estimated that there will be only 600,000 DSS units^{24/} available for sale in 1994. DIRECTV projects that all 600,000 units will be sold this year. After three years of operation, DIRECTV forecasts it will have at least 3 million subscribing households. The bases for these projections include numerous primary market research studies performed by DIRECTV as well as current backyard dish sales (at \$2000 - \$3000 per unit, 400,000 to 500,000 C-band dishes are sold annually). In addition, outside sources, in particular Paul Kagan Associates (a media research firm which keeps close tabs on the television industry performance), estimates that there will be 4.9 million DBS subscribers by the end of 1996.

- (e) *In what circumstances are multiple decoders required? Is the current cost of installation and equipment an impediment to attracting customers?*

If each of the televisions in a subscribing household wishes to view different DIRECTV channels at the same time, then a DSS receiver is required for each TV set. If, however, the televisions are not on at the same time (e.g., the subscriber decides to stop

^{24/} DIRECTV programming is received by the Digital Satellite System ("DSS") at consumers' homes. DSS equipment includes an eighteen-inch satellite dish, digital receiver, and remote control. The DSS is being manufactured initially by Thomson Consumer Electronics under the RCA brand name.

watching programming on the living room TV and resumes viewing of the programming on the bedroom set), then multiple DSS receivers are not required. This is the same situation as for a cable subscriber watching scrambled programming -- a specific box is needed for each television set to unscramble the signal.

There is currently a clear consumer demand for DSS equipment and installation attending the rollout of the DIRECTV service. DIRECTV believes and its research has confirmed that the equipment and installation cost (if installation help is needed) will not hinder achievement of DIRECTV's ultimate 10 million subscriber forecast, particularly because DSS equipment costs to consumers will decline over time from the current \$700 price.

- (f) *How will prices charged by DIRECTV for this service compare with the prices charged for cable service?*

DIRECTV's pricing and packaging is extremely competitive with cable pricing and packaging. Initially (summer of 1994) DIRECTV will offer a package of 25+ channels called Personal Choice for \$21.95 a month. The Personal Choice package will be expanded to 30+ channels by the fall of 1994. In the fall, consumers will be also able to purchase the Total Choice package for \$29.95 per month, which features over 40 channels of subscription programming.

Significantly, DIRECTV includes two premium services -- The Disney Channel and Encore -- as standard offerings in its basic subscription package.^{25/} DIRECTV consumers also receive access to its Direct Ticket pay-per-view offerings, which include hit

^{25/} Cable subscribers, for example, pay an average price of about \$9.50 for The Disney Channel as a premium offering. Beginning this fall, DIRECTV will also offer Music Choice, an offering that features 30 CD quality formatted music channels, as part of its basic subscription packages.

Hollywood movies as often as every 30 minutes at \$2.99 each. DIRECTV's packages include a \$2.50 coupon that can be used towards a Direct Ticket purchase each month. This unique blend of packaging and price is not replicated by any cable system.

It is important to point out that DIRECTV's pricing is directly related to its ability to acquire programming under the program access rules. For example, DIRECTV has been denied access to either HBO or Showtime programming. Thus, in order for a DBS customer to receive a package of programming that is equivalent to a package offered by a single cable operator, that customer must buy both DIRECTV and USSB programming packages. Purchased together, these two services will almost certainly cost more than the single integrated programming packages offered by either cable operators or Primestar. Customers will also be denied the economies of "one-stop shopping" offered by cable operators and Primestar, and instead must deal with two customer service centers, two bills and potentially two sales staffs in order to obtain the single complement of program offerings equivalent to that offered by cable providers.

The point is an important one in terms of emerging price competition to cable operators. Unless DIRECTV and other alternative MVPD competitors can each be assured of obtaining the kinds of programming that cable offers on an integrated basis, cable operators (or Primestar) will in all likelihood be able to price below the combined price of purchasing separate services from two or more separate MVPDs.

- (g) *Are prices nationally uniform, or do they vary depending upon the location of the subscriber? If they vary, what are the reasons for the pricing differentials?*

DIRECTV prices are uniform for all subscribers nation-wide, except for those who live in NRTC territories. NRTC has a marketing arrangement with DIRECTV which

includes the ability for NRTC's to set members local prices for DIRECTV packages and programming. Nevertheless, DIRECTV expects that most NRTC members will follow DIRECTV's national suggested retail prices.

- (h) *How long is it likely to take for DIRECTV to serve as a competitive alternative to cable? What is the basis for this projection?*

DIRECTV hopes to make measurable inroads into the cable market, first, in the unserved or underserved (low channel capacity) areas, and next in the medium capacity areas where DIRECTV's differentiated programming offers an attractive alternative to what those cable systems are capable of offering.

DIRECTV's intended emergence as a significant competitor to cable, however, will not be easy. Already, the inability of DIRECTV to obtain HBO and Showtime has influenced its business plan and placed it in a riskier posture in terms of cable competitiveness.^{26/} Nevertheless, DIRECTV is confident in its ultimate ability to succeed, particularly if the Commission exercises vigilance in maintaining and enforcing strong program access protections.

IV. TRENDS IN HORIZONTAL AND VERTICAL CONCENTRATION

DIRECTV believes that the Commission's efforts in the NOI to gather data on horizontal ownership and vertical integration not only comport with its Congressional mandate, but are vital in monitoring the emergence of competition in the multichannel video

^{26/} Specifically, without the premium class of cable services (e.g., HBO and Showtime) DIRECTV relies almost exclusively on pay-per-view to satisfy customer demand for "current hit" movies. Pay-per-view requires significantly more capital, customer service costs, installation complexity and channel capacity to compete. In addition, contracts between some studios and some premium services include strict guidelines on the marketing and packaging of pay-per-view offerings that have the effect of limiting the possibilities for pay-per-view success.

distribution marketplace. There are real concerns that cable entities may be able to exert undue market power, for example, through the exercise of partial ownership in other MVPDs or other affiliation arrangements that could stifle the emergence of MVPD competitors. This, in fact, was the reason that the Commission adopted a strict 5% attribution threshold in its program access rules, i.e. to curb incentives for cable operators to influence affiliates to the detriment of competitors.^{27/} Thus, the Commission's assemblage of relevant affiliation, investment, partnership and other similar data is not only advisable, but vitally important.

V. CHANGES IN PRACTICES/CONDUCT OF MULTICHANNEL VIDEO PROGRAMMING VENDORS AND DISTRIBUTORS SINCE PASSAGE OF THE 1992 CABLE ACT

The NOI seeks to determine whether anticompetitive practices in the multichannel video distribution markets have diminished, and whether new and potentially anticompetitive conduct has developed.

DIRECTV has responded to this question in some detail in Section II above. The 1992 Cable Act in general and the Commission's program access rules in particular broke the "logjam" with respect to DIRECTV's acquisition of programming from vertically integrated suppliers. DIRECTV's experience over the past few years has absolutely validated the Commission's suggestion in the NOI that the mere "existence" of the statutory provisions and rules has had a pronounced effect on DIRECTV's ability to obtain crucial cable programming.^{28/} There now appears to be more freedom and incentive for vertically integrated programmers to deal with alternative MVPDs like DIRECTV, and less fear in general of offending powerful cable interests by doing so.

^{27/} Program Access Order at ¶ 32.

^{28/} See NOI at ¶ 73(b).

Yet, if the 1992 Cable Act in some sense forced cable interests to accept on at least a threshold level the emergence and existence of alternative MVPD competition, it has also, as demonstrated earlier, encouraged new strategies and campaigns to control and limit the development of emerging competition, and particularly to dictate emerging competitors' programming lineups. Unless the Commission is vigilant and aware of the many manifestations of the problem, competition will not thrive.

This problem also manifests itself through the developing presence of Primestar as a competitor in the satellite DTH market. Prior to this year, Primestar did not even offer cable programming. (It sold seven superstations, three channels of pay-per-view offerings, and a foreign language channel.) Now, however, Primestar has announced its intent to offer an entire range of cable programming to compete directly with alternative MVPDs and reduce their market share. Primestar clearly is not an arms length player independent of the cable industry. The owners of Primestar own virtually all of the vertically integrated programmers. To the extent Primestar contracts with its related programmers somehow become the industry "standard" (through packaging arrangements, "most favored nation" clauses or the like), the competitive MVPD industry will surely suffer. The Commission should remain vigilant to help ensure that such actual and theoretical impediments to competition do not stifle the emerging MVPD industry.

The overriding theme in all of these examples is that the 1992 Cable Act, and the Commission's implementing rules and decisions, while of enormous help to non-cable MVPDs, have not yet finished their job. The cable industry keeps finding creative ways to adapt to and influence the development of emerging competition. As the Commission seeks appropriate regulatory responses, DIRECTV requests that the Commission vigorously

enforce its program access rules while gathering as much data as possible on the competitive makeup of the multichannel marketplace. The Commission should further be mindful of and rebuff efforts to "water" down or otherwise circumvent the 1992 Cable Act's program access protections.

VI. COLLECTION OF DATA FOR FUTURE REPORTS

DIRECTV recommends that the Commission adopt the NOI's proposal to gather from cable MSOs and vertically integrated entities data of the type requested under the terms of the Primestar Decrees.^{29/} In addition, to the extent that the Commission seeks data via surveys or other questions propounded to cable interests, it would be useful for the Commission to discover whether any contracts entered into by either vertically integrated programmers or cable operators have clauses built into them that mandate, incentivize or otherwise suggest price increases or other differential treatment by programmers as a consequence of doing business with DBS operators or other alternative technologies.


VII. CONCLUSION

The Commission has noted the importance of program access protections as a cornerstone of its regulatory program to encourage competition to cable and to ensure that "transitional" rate regulation does not become permanent. Strict adherence to the 1992 Cable Act and the Commission's implementing regulations are therefore critical.

^{29/} NOI at ¶ 87.

Respectfully submitted,

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